ern Ry. Co. v. *Chapman Jack Co.* (C. C. A. 4th Circ. 1902) 117 Fed. 424, debts for jack-screws sold to a railroad company over six months previous to the receivership were held not entitled to preference; while the sale of the same kind of articles, made within that period, was held to create a preferred debt. This limit of six months is well settled in the lower courts. *Cent. Trust Co.* v. *East Tenn. R. Co.* (1897) 80 Fed. 624, and has been adopted by the Supreme Court, *Union Trust Co.* v. *Ill. Midland Co., supra.*

Still another recent decision, *Southern Ry. Co.* v. *Ensign Mfg. Co.* (C. C. A. 4th Circ. 1902) 117 Fed. 417, raises the point as to preference of a debt for goods supplied to one line to be used upon another. There the intervenor sold car-wheels to the A railway, with knowledge that the purchaser intended to use them upon the B line, which was under lease to the A company. On foreclosure of a mortgage covering only the A railway, it was held that the claim could not be preferred. The Court well distinguishes *Southern Ry.* v. *Carnegie Steel Co. supra*, where, though the rails in question were used upon a subordinate road, yet the latter was covered by the mortgage under foreclosure. The obverse is presented by *Coal Co.* v. *Central R. R., supra*, where, on a state of facts very like those in the *Ensign Mfg. Co's* case, the foreclosure was of a mortgage upon the leased line, instead of that of its lessee; in which case the debt was given preference.

An important question is, out of which fund are these debts, when allowed, to be paid? If the surplus earnings have, in fact, been "diverted," clearly the *corpus* must meet the debt. If the lower court has itself, after denying the intervention "diverted" the earnings by ordering their application to other things, the appellate court can, on reversal, direct payment out of the *corpus*. *Burnham* v. *Bowen, supra*. If the operation of the road by the receiver has resulted in surplus earnings, payment can be made from them. *Southern Ry.* v. *Carnegie Steel Co.; Coal Co.* v. *Central R. R., supra.* But if there has been no surplus either before or after the receivership, the debt cannot be preferred, and the *corpus* cannot be touched. *St. Louis R. Co.* v. *Cleveland R. Co.* (1888) 125 U. S. 558; *Niles Tool Co.* v. *Ry. Co.* (1902) 112 Fed. 561.

CONSTITUTIONAL LAW—EMINENT DOMAIN—INJURY TO BUSINESS. The Fifth Amendment to the Constitution of the United States and the constitutions of the various States provide that private property shall not be taken for public use without just compensation. A recent Massachusetts case decides that a mere injury to an established business without the actual appropriation of the land on which it is carried on is not a "taking of property" in such a sense as to entitle its owner to compensation therefor. *Sawyer* v. *Commonwealth* (1902) 65 N. E. 52. The Court says on p. 53: "A business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals."

In *Monongahela Nav. Co.* v. *U. S.* (1892) 148 U. S. 312, it was held that this provision extends only to property taken; that what is physically appropriated must be paid for; but that this is as far as the

provision goes. To quote: "And this just compensation, it will be noticed, is for the property and not to the owner." The case then continues to explain by saying that the other provisions of this Amendment are purely personal: "No person shall be held, etc., but " instead of continuing that form of statement and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the just compensation is to be a full equivalent for the property taken." Accordingly it is generally held, first, that there can be no recovery for an injury to business itself, for example, loss of profits due to competition or other cause, loss of " good-will " or loss of future or contingent profits; but, second, that if it can be shown that such business tended to enhance the market value of the property taken, evidence to this effect may be admitted to show what "just compensation" therefor is. *Whitman* v. *Boston & Maine R. R. Co.* (1861) 3 Allen 133. In *Edwards* v. *Boston* (1871) 108 Mass. 535, where land had been taken by the City of Boston under a statute to widen a certain street, the Court said: " 'Good-will' of the business of a lessee or other owner is not property for which damages can be included; and is to be considered only so far as it tends to enhance the market value of the estate that is injured." But on the other hand, in considering whether the market value of the property is affected, the courts are not limited to the use to which the occupier is putting the property, but as stated in *Maynard* v. *Northampton* (1892) 157 Mass. 218: "any and all of the uses to which the land considered as property may profitably be applied whether contemplated by the owner or not, may well be taken into account by the jury." Also, if certain facts exist which do enhance the value of the property, such facts can be considered even though the owner or occupier had no legal right to have them continue in existence. In *N. Y. N. H. & H. Ry. Co. et al.* v. *Blocker et al.* (1901) 178 Mass. 386, at the time of the taking of the plaintiff's land, spur tracks connected the coal-yard on it with the main railroad, and though the railroad had a right to remove them at any time, it was held that the fact of their being there could be taken into consideration in determining the market value: "the fact that it is done there, and is likely to continue to be done there, is a fact which affects the market value of the land."

Evidence is not, however, admissible to show that business will be diminished by competition. *Petition of Mount Washington Road Co.* (1857) 53 N. H., 134. In this case the plaintiff, a hotel keeper, who had built a bridle path to the summit of the mountain, was not allowed to show that the building of a carriage road would injure his business of hiring out saddle-horses. In *Troy & Boston R. R. Co.* v. *Northern Turnpike Co.* (1852) 16 Barb., 100, conjectures by witnesses as to the probable injury to a turnpike business by the defendant railroad were not admitted.

If the property is peculiarly adapted naturally, or by its owner to any special use, the fact may be introduced. *Dupuis* v. *C. & N. W. Ry. Co.* (1885) 115 Ill., 97. *Pittsburgh & Western Ry. Co.* v. *Patterson* (1884) 107 Pa. St., 461. Such a case was that of *King* v. *Minneapolis Union Ry. Co.* (1884) 32 Minn., 224, where the plaintiff had fitted up his property for a plough factory, and made it particularly adapted for this purpose.

Some courts, not necessarily accepting the interpretation of the constitutional provision given in *Monongahela Nav. Co.* v. *U. S.* endeavor to reconcile the cases by saying that in order for injuries to be considered such a taking as to entitle the owner to compensation, they must be actual injuries that reduce the market value of the property. They must not be merely speculative, prospective or contingent; and, therefore injuries to business are usually too remote to be considered in estimating the amount of compensation, because they depend too much on contingencies that are uncertain and speculative. This test, however, fails to account for those adjudicated cases where, notwithstanding an actual and direct injury, no compensation has been allowed. They can only be explained on the theory that business is not property and therefore, under the interpretation put upon the constitutional provisions by the *Monongahela Co.* case, not within its protection.

Now it is true that we generally think and speak of property as a corporeal thing, something tangible. But, as is said by Mr. Lewis in his work on Eminent Domain §§ 54 *et seq.* "A little reflection will suffice to convince anyone that property is not a corporeal thing itself of which it is predicated, but certain rights in or over the thing. * * * We must, therefore, look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. Property may be defined as certain rights in things which pertain to persons, and which are created and sanctioned by law. These rights are the right of user, the right of exclusion, and the right of disposition." Taking this view of "property" it seems consistent to agree with Mr. Sedgwick in his work on Constitutional Law (2 ed.) § 247, where he discusses the interpretation of this clause of the constitution. He says: "It seems to be settled that, to entitle an owner to protection under this clause, the property must actually be taken in the physical sense of the word, and the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly or unquestionably resulting from the exercise of the power of Eminent Domain." After thus stating the law, he continues, "It seems very difficult in reason to show why the State should not pay for property of which it destroys or impairs the value, as well as for what it physically takes. If by reason of a consequential damage the value of real estate is positively diminished, it does not appear arduous to prove that in point of fact, the owner is deprived of property, though a particular piece of property be not actually taken." This view is taken in *Eaton* v. *Ry. Co.* (1872) 51 N. H., 504, where the defendant, after making compensation for that part of the plaintiff's land which it took, removed a natural barrier on adjoining property and thereby caused an overflow of water on the plaintiff's land. The court allowed a recovery on the ground that the plaintiff had a property right to be protected by this natural barrier, and that therefore the destruction of it amounted to a further taking by the defendant over and above what it had already paid for, and that therefore the plaintiff was entitled to further compensation under the Constitution. This case and its reasoning has been followed in some jurisdictions, though the general rule of law seems to be the other way. Lewis points to this as the new rule gradually taking the place of the other;

and see 2 COLUMBIA LAW REVIEW, 383. It would be a more logical result, certainly, to say that where a man's right of user, of exclusion or of disposition over a thing, whether land, business or anything else, corporeal or incorporeal, is taken away or destroyed under Eminent Domain, such person should have "just compensation" under the Constitution in every case where he would have had an action for damages against a private person under the common law.

CARRIER'S DUTY TOWARDS PASSENGERS AND LICENSEES.—A recent Texas case, *Houston & Texas Central R. Co.* v. *Phillis* (1902) 69 S. W. 994 raises an interesting question. The plaintiff and his wife were assaulted by a drunken man, who was allowed to come into the defendant's depot. The wife had purchased a ticket and was waiting for a train. The husband was acting as escort and had no intention of becoming a passenger. It was held that the wife was a passenger, and as such, had a cause of action, but that the husband being a mere licensee had no right of action.

It might, with some show of reason, be said that the carrier in the exercise of its public calling, owes a duty to all those who are lawfully in the station, whether passengers or licensees. But the rule which requires a passenger carrier to protect against injuries by third persons has obviously no parallel and no origin in the law of tort. It is a comparatively recent application of the ancient duty to safeguard the passenger. *R. Co.* v. *Burke* (1876) 53 Miss. 200; *Britton* v. *Ry* (1883) 88 N. C. 536. It is paralleled only by the duty imposed upon the carrier of protecting its passengers from wanton assaults by its servants, whether the acts are within the apparent scope of authority or not. See 2 COLUMBIA LAW REVIEW, 488. It is no light responsibility, and should not be lightly imposed. The mere fact that the railroad is a carrier of passengers has not been considered a ground for extending its liability to the general public, beyond that of the innkeeper or the man who keeps a shop. The extraordinary duties of the carrier are those owed to passengers, and, unless the dual relation of passenger and carrier exists, one must agree with the result reached in the principal case as far as the rights of the husband are concerned.

The adoption of this test as a working rule, however, is not without its difficulties. It raises the perplexing question of defining the term passenger. Nor have judicial dicta thrown much light on the subject. In the majority of cases, it would make not the slightest difference in the result reached, whether the person seeking redress were a passenger or a licensee. The carrier like the innkeeper or shopkeeper, is under a duty to keep its premises in safe condition. Where the cause of action arises from a failure to perform this duty, it matters not that the plaintiff is a passenger, and to call him such is entirely obiter. The analogy between freight and passengers, which is sometimes attempted, *Webster* v. *Fitchburg R. Co.* (1894) 161 Mass. 298, is in some degree helpful. In the case cited it is said: "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, and